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In the Supreme Court of the United States

OCTOBER TERM, 1978

No. _____

STATE OF OREGON,

Petitioner,

v.

GARY LEE FONDREN,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OREGON

JAMES A. REDDEN
Attorney General of Oregon
WALTER L. BARRIE
Solicitor General
THOMAS H. DENNEY
Assistant Attorney General
JAMES M. BROWN
Assistant Attorney General
State Office Building
Salem, Oregon 97310
Phone: (503) 378-4402
Counsel for Petitioner

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In the Supreme Court of the United States

October Term, 1978

No. _____

STATE OF OREGON,

Petitioner,

v.

GARY LEE FONDREN,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OREGON

The petitioner, State of Oregon, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of the State of Oregon entered in this proceeding on February 27, 1979.

OPINIONS BELOW

The opinion of the Court of Appeals of the State of Oregon reversing the order suppressing evidence entered by the Circuit Court of the State of Oregon for Deschutes County and remanding for trial, Appendix B hereto, is reported at 30 Or App 1045, 568 P2d 721 (1977). The opinion of the Supreme Court of the State of Oregon reversing the decision of the court of appeals, Appendix A hereto, is reported at 285 Or 361, 591 P2d 1374 (1979).

JURISDICTION

The decision of the Supreme Court of the State of Oregon, Appendix A hereto, was filed on February 27, 1979, and this petition for a writ of certiorari was filed within 90 days of that date, pursuant to Rule 22(1). This Court's jurisdiction is invoked under 28 USC § 1257(3).

QUESTIONS PRESENTED

1. Does the Fourth Amendment, as applied to the States by the Fourteenth Amendment, prohibit, in the absence of further "exigent circumstances," the warrantless seizure of an automobile from an employee parking lot by a police officer who has probable cause to believe that contraband drugs are contained therein and who proposes to obtain a search warrant to search for them, when the operator of the automobile has been informed of the officer's intentions and is not in custody?

2. Is the warrantless seizure of an automobile under the circumstances described in question (1) rendered Constitutionally unreasonable by the officer's failure to obtain a search warrant when he first acquired probable cause to believe that the automobile contained contraband drugs?

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment IV:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated. . . ."

United States Constitution, Amendment XIV, § 1:

> ". . . [N]or shall any State deprive any person of life, liberty or property, without due process of law . . ."

STATEMENT OF THE CASE

A. General Background

Fondren was indicted by the Grand Jury for Deschutes County, Oregon, upon two counts of Criminal Activity in Drugs (possession of marijuana, ORS 167.207, and possession of peyote, ORS 167.207). Prior to trial, he filed a "Motion to Suppress" evidence (Appendix E, hereto) seized from his car, including marijuana and peyote. Following hearing, the trial court granted the motion. (See Appendix C, hereto). The state appealed to the Oregon Court of Appeals, which reversed (see Appendix B hereto). The Oregon Supreme Court granted review and reversed the decision of the Court of Appeals, affirming the decision of the trial court.

B. Facts Material to the Questions Presented

During the early evening hours of July 22, 1976, between 6:30 p.m. and 7:30 p.m., Bend, Oregon city police officer Meier received a telephone call at home from a confidential reliable informant. (Tr. 2-3, 12). Meier was told that the informant had observed

within the past 24 hours a quantity of marijuana in the trunk of an automobile driven or owned by Gary Fondren, the defendant herein. (Tr. 2-3). After changing clothes, Meier drove to the Brooks-Willamette particle board manufacturing plant, the location given by informant, and located the described car in the plain sight in a parking area that appeared to be a private lot for the employees at Brooks-Willamette. (Tr. 4-5, 13). Thereafter, Meier went to the police station where he ran a registration check on the car, checked for arrest records and background information on Gary Fondren, talked by telephone with a deputy district attorney, made a second trip to check on the car with another police officer, discussed the case with the police department's shift commander and made arrangements with the sheriff's department for assistance because the car was located outside of the city limits. (Tr. 5-6, 14, 15). Meier considered writing or preparing an affidavit for search warrant but because it was then 10 to 10:30 p.m. in the evening and he had learned that the work shift at Brooks-Willamette ended at midnight, he stopped work on the application for search warrant and returned to the plant with the sheriff's deputy. (Tr. 6). At the plant Meier contacted defendant, identified himself, asked him to step outside, told him that he had information that marijuana was hidden in the trunk of his car,

advised him of his constitutional rights and asked for consent to search the car which Fondren declined to give. (Tr. 7). Meier then told Fondren that he intended to seize and hold the car until he could make application for a search warrant — Fondren rejoined that no one would touch his car and that he wanted to consult his attorney. (Tr. 7). Fondren went back inside and Meier summoned a tow truck. When preparations for removal of the car were completed, Meier went back into the plant to look for Fondren and found that he had left. The car was then towed to the police garage at the Bend Police Department. (Tr. 7-8). The car was searched the following day under a search warrant. (Tr. 8). (The validity of the search warrant has not been an issue in proceedings below).

Following hearing on defendant's motion to suppress evidence, the trial court filed its "Memorandum Opinion" (Appendix D hereto) allowing the motion.

C. Manner in Which the Federal Question Was Raised

The Federal question presented herein was originally raised by defendant Fondren by his timely "Motion to Suppress" evidence:

> "This motion is based upon the ground that the warrantless seizure of said automobile was unreasonable and hence a violation of defendant's rights under the Fourth and Fourteenth Amendments of the United States Constitution. The

informant upon which police officers relied to establish probable cause for seizing the automobile as well as for obtaining a search warrant was not reliable. Defendant did not show the contents of the trunk of said automobile to anyone on July 21, or 22, 1976. There was therefore no probable cause for seizure of the automobile. Furthermore, no exigent circumstances existed which justified its seizure." (See Appendix E hereto).

In its Memorandum Opinion, the trial court held that the Constitution required exigent circumstances prior to the lawful seizure of the car:

> "*Cardwell v. Lewis,* 417 US 583, 41 L Ed 2d 235 (1974) does not control. It involved scrapings from the exterior of a vehicle parked in a public place. Nothing from the interior of the car and no personal effects were searched or seized. The Court stated, 'This is not to say that no part of the interior of an automobile has Fourth Amendment protection . . . it is the right to privacy that is the touchstone of our inquiry', at 335.
>
> "The State contends ORS 167.247 allows a warrantless search absent the requirements of exigent circumstances. This argument was made in *State v. Pearson,* 15 Or App 1. The Court of Appeals declined to decide the issue even though apparently it was properly presented. In light of *Coolidge v. New Hampshire, supra,* this Court concludes that ORS 167.247(1) cannot be constitutionally applied without the requirements of exigent circumstances." (Appendix D hereto)

The Order of the trial court, allowing defendant's motion to suppress evidence, set forth its finding and ruling:

> "The court has since considered the evidence and written briefs which both parties have filed, and, now being fully advised, finds upon the basis of the evidence and record that exigent circumstances did not exist and concludes therefore, that the warrantless seizure of the defendant's vehicle and subsequent search of defendant's vehicle and seizure of the evidence contained therein were unreasonable and illegal." (Appendix C hereto).

On the state's appeal to the Oregon Court of Appeals, this ruling of the trial court was assigned as error in the state's brief: "The circuit court erred in granting defendant's motion to suppress evidence." (App. Br. at 5). In reversing the trial court's order suppressing evidence, the Oregon Court of Appeals stated:

> "The trial judge held that in addition to probable cause, exigent circumstances to seize or search an operable automobile must exist before such can be done without a warrant. This was error." 30 Or App 1045, 1047, 568 P2d 721 (1977) (Appendix B hereto).

In seeking review of the court of appeals decision, defendant urged the following:

> "1. The presence of exigent circumstances is required to justify the warrantless seizure of defendant's automobile.
>
> "2. Neither mobility nor operability of an automobile is by itself a sufficiently exigent circumstance to justify a warrantless seizure on probable cause." (Petition for Review, p. 2, 10).

In its opinion reversing the decision of the court of appeals, the Oregon Supreme Court concluded that exigent circumstances were required under the Fourth

Amendment as a precondition for the lawful seizure of the vehicle and that such circumstances were not present in this case.

The Federal question presented herein has demonstrably been properly raised and appropriately preserved at all stages of this case.

REASONS FOR GRANTING THE WRIT

A. The Oregon Supreme Court has decided an important question of Federal constitutional law in a manner in conflict with the applicable decisions of this Court.

The decision of the Oregon Supreme Court that police could not lawfully seize an automobile without a warrant because information necessary to make application for a warrant was available at least four hours before the seizure is at substantial variance with the principles of *Cardwell v. Lewis,* 417 US 583 (1974) and *Chambers v. Maroney,* 399 US 42 (1970).

In *Cardwell v. Lewis, supra,* the Court held that the warrantless seizure of an automobile from a commercial parking lot did not violate the protections of the Fourth and Fourteenth Amendments even if it were assumed that probable cause had existed prior to the circumstances deemed exigent. *Chambers v. Maroney, supra,* upheld on Constitutional grounds the proceeds of a vehicle search even though probable cause existed when the car was stopped and the car was then driven to the police station where it was thoroughly searched.

The Oregon Supreme Court opinion fails to recognize and apply the long-standing distinction of this Court between the circumstances justifying a warrantless search of home or office and those circumstances justifying warrantless seizure and search of automobiles. The opinion below has engrafted an element of foreseeability upon the Fourth Amendments' standard for the immobilization of an automobile without a warrant. Such a rule is at odds with the decisions of this Court.

B. The Oregon Supreme Court has decided an important question of Federal constitutional law in a manner contrary to that of other courts, State and Federal.

The principles of *Cardwell v. Lewis, supra,* and *Chambers v. Maroney, supra;* have been followed by several courts that have held evidence admissible which was taken from automobiles seized without warrants where police might have obtained search warrants prior to the seizures. See, for example, *United States v. Ramirez,* 513 F2d 72 cert. denied sub nom. *Ramirez v. United States,* 423 US 912 (1975) (5th Cir 1975) (federal agents could have obtained warrant to search truck but had not planned to need warrant); *United States v. Abascal,* 564 F2d 821 (9th Cir 1977) cert. denied sub nom. *Abascal v. United States,* 435 US 953 (1978) (the court noting absence of any rule requiring officers to strike the instant they have

probable cause); *Commonwealth v. Holzer,* 480 Pa 93, 389 A2d 101 (1978) (vehicle located on street nine hours after defendant's arrest, impounded and transported prior to obtaining of search warrant). The conflict between these decisions and the decision herein merits resolution by this Court.

CONCLUSION

The decision of the Oregon Supreme Court expanding the warrant requirement for the seizure of a vehicle from premises open to the public unreasonably and unnecessarily restricts police practices and operates to the confusion and confoundment of Oregon police and prosecutors. Accordingly, and for the reasons given above, a writ of certiorari should issue to review the judgment and opinion of the Supreme Court of the State of Oregon herein.

Respectfully submitted,

JAMES A. REDDEN
Attorney General

WALTER L. BARRIE
Solicitor General

THOMAS H. DENNEY
Assistant Attorney General

JAMES M. BROWN
Assistant Attorney General
Counsel for Petitioner

May, 1979

APPENDICES

Appendix A

No. 32—February 27, 1979

IN THE SUPREME COURT OF THE STATE OF OREGON

In Banc

STATE OF OREGON, *Respondent,*
v.
GARY LEE FONDREN, *Petitioner.*
(No. 20990, CA 7504, SC 25651)

On review from the Court of Appeals.*

Argued and submitted April 3, 1978.

J. P. Graff, of Gildea & McGavic, P. C., Eugene, arguedd the cause and filed the briefs for petitioner.

John W. Burgess, Assistant Attorney General, Salem, argued the cause for respondent. With him on the briefs were James A. Redden, Attorney General, and W. Michael Gillette, Solicitor General, Salem.

Stephen Kanter, Portland, filed a brief amicus curiae in behalf of Oregon American Civil Liberties Union.

DENECKE, C. J.

Reversed.

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*Appeal from Circuit Court, Deschutes County. Walter I. Edmonds, Jr., Judge. 30 Or App 1045, 568 P2d 721 (1977).

DENECKE, C. J.

This is another of the search and seizure of vehicle cases in which we granted review. *State v. Greene,* 30 Or App 1019, 568 P2d 716 (1977); *State v. Downes,* 31 Or App 419, 571 P2d 914 (1977); *State v. Groda,* 32 Or App 287, 573 P2d 1269 (1978).

In *State v. Greene, supra,* 285 Or ——, — P2d ——, decided this date, we discussed the general principles governing searches and seizures of automobiles.

The facts in this case are that early one evening an officer received reliable information that the defendant had marijuana in the trunk of his car which was parked at the defendant's place of employment. The officer verified the location and ownership of the car. At about 11:30 p.m. the officer went to defendant's place of employment and asked defendant if he could look in his trunk. The defendant refused and the officer had the car towed to the police garage. The next day the officer secured a search warrant and found the marijuana.

The defendant filed a motion to suppress. The trial court found there were no exigent circumstances permitting the seizure of the car without a warrant and suppressed the evidence. The Court of Appeals reversed in a per curiam opinion which appears to state that no exigent circumstances need exist to seize an operable automobile without a warrant. *State v. Fondren,* 30 Or App 1045, 568 P2d 721 (1977).

The state argues in this case and in *State v. Greene, supra,* (285 Or ——), that exigent circumstances are not necessary in this case or in *Greene* because the officer did not have to "invade an enclave of the defendant's privacy to make a seizure"; the employe parking lot was not an enclave of privacy, neither was the residential driveway in *Greene.*

Some past decisions lend plausibility to this contention; however we are of the opinion that it does not apply in the present case. The principle germinated in *Hester v. United States,* 265 US 57, 44 S Ct 445, 68 L Ed 898 (1924), in which the officers trespassed on private land and seized containers of moonshine whiskey which had been dropped by the fleeing suspects. The Court stated the containers and their contents had been abandoned and the Fourth Amendment does not apply to a seizure of abandoned property in "open fields."

Hester was cited in support of the decision in *G.M. Leasing Corp. v. United States,* 429 US 338, 97 S Ct 619, 50 L Ed2d 530 (1977), in which the officers seized automobiles in satisfaction of tax assessments. The Court held that because the seizures took place on public streets, no invasion of privacy was involved and the seizures were not unconstitutional. The Oregon Court of Appeals followed the rationale of *Hester* in *State v. Stanton,* 7 Or App 286, 490 P2d 1274 (1971),

and held the seizure of a marijuana plant in an "open field" was not subject to Fourth Amendment protection.

We conclude that the absence of Fourth Amendment protections in these circumstances is because of the nature of the object seized as well as the place of seizure. In *Hester* it was abandoned contraband; in *Stanton* it was contraband; in *G.M. Leasing* it was property that the government was entitled to seize to satisfy taxes. The government has traditionally been granted broad powers to seize property to satisfy taxes. Notes, 23 NY Law School L Rev 791 (1978); 29 Mercer L Rev 359 (1974).

An automobile on the public street is protected by the Fourth Amendment. *Chambers v. Maroney,* 399 US 42, 51, 90 S Ct 1975, 26 L Ed2d 419 (1970), so held. *Chambers* was based upon an interpretation of the Fourth Amendment commenced in *Carroll v. United States,* 267 US 132, 45 S Ct 280, 69 L Ed 543, 39 ALR 790 (1925). The doctrine of *Carroll* is that if the officers have probable cause to believe that a car contains evidence of a crime and there are exigent circumstances requiring immediate action, the car can be seized and searched without a warrant. In *Carroll* and in almost all of its offspring, the car involved was stopped by the officers on a public street or in a public place where there was no expectation of privacy.

Nevertheless, in all of those cases the applicability of the Fourth Amendment was assumed and a warrantless search and seizure was weighed by the criteria of probable cause and exigent circumstances. We are of the opinion that whether the seizure was valid in this case depends upon the same criteria.

The defendant does not contend the officers did not have probable cause. The issue is, were there exigent circumstances; that is, was the contraband likely to disappear if the officers could not seize the car without securing a warrant? *State v. Greene, supra* (285 Or ——). The trial court held there were no exigent circumstances and we concur. The Court of Appeals was in error in holding that the trial court erred in holding "that in addition to probable cause, exigent circumstances to seize or search an operable automobile must exist before such can be done without a warrant." 30 Or App at 1047.

The facts on the issue of exigency are: Between 6:30 and 7:30 p.m. the officer obtained the information that marijuana was in the trunk of a car driven or owned by defendant, the make and license number of the car, that the defendant was employed by Brooks-Willamette and that the car was now parked in a Brooks-Willamette employes' parking lot. The information and the source of the information were sufficient to provide the officers with probable cause to

believe marijuana was in the car. Within 45 minutes after receiving the information the officer found the car on the Brooks-Willamette lot. He then discussed the matter with his shift commander and verified that the car was registered to a Fondren; however, not to the defendant Gary Fondren. The officer discussed with his commander whether to seek a search warrant. At 8:45 the officer, with another officer, went back and looked at the car. The officer then did 'some checking' on defendant. At some time during the evening the officer talked to a deputy district attorney about the matter. At 10:00 or 10:30 p.m. the officer contemplated preparing an affidavit to apply for a search warrant but decided there was not enough time as the defendant would finish his shift at 12:00. The officer testified an affidavit can be prepared and a search warrant can be obtained within an hour and a half to four hours.

At 11:30 p.m. the officer went to Brooks-Willamette and had the defendant called from his job. The defendant refused to consent to a search of his car. The officer had the defendant's car towed to the police garage. The next day the officer prepared an affidavit containing the information he had from the previous evening and the court issued a searach warrant. The trunk was searched and the marijuana was seized.

As we observed in *State v. Greene, supra* (285 Or ——), decided this date: "Underlying both of these

propositions [probable cause and exigent circumstances] is the overall principle * * * that searches [and seizures] conducted without a warrent are *per se* unreasonable, subject only to a few exceptions." 285 Or at ——.

In this case, at least four hours before the defendant was due to finish his shift and go to his car, the officer had all the information he needed to establish probable cause to secure a warrant from a magistrate. He had the same information he stated in his affidavit prepared the next day. The officer testified four hours was the maximum time needed to secure a warrant. There is no intimation that anyone other than the defendant would have had access to the car before the defendant finished his shift at midnight. The officer was not concerned with someone else gaining access to the car as he did not put the car under surveillance. That the officer waited until 10:00 p.m. or thereafter to attempt to obtain a warrant and then decided there was insufficient time does not create exigent circumstances. The officer testsified that at a time which must have been around 8:00 p.m. he discussed obtaining a warrant. The officer cannot create exigent circumstances by his own inaction.

The only automobile decision by the United States Supreme Court which held exigent circumstances were not present is *Coolidge v. New Hampshire,* 403

US 443, 91 S Ct 2022, 29 L Ed2d 564 (1971). Whether that part of the decision concerning exigent circumstances was by a plurality or a majority is uncertain, but in any event the facts which we discuss in *State v. Greene, supra,* (285 Or ——), are not comparable.

We are of the opinion that exigent circumstances continue to be a valid criteria under the Fourth Amendment as most recently held in *United States v. Chadwick,* 433 US 1, 14, 97 S Ct 2476, 53 L Ed2d 538 (1977), and they are not present in this case.

Reversed.

Appendix B

Argued August 24, reversed and remanded September 19, reconsideration denied October 26, 1977, petition for review pending

STATE OF OREGON, *Appellant,*
v.
GARY LEE FONDREN, *Respondent.*
(No. 20990, CA 7504)

568 P2d 721

The state appealed from an order of the Circuit Court, Deschutes County, Walter I. Edmonds, Jr., J., which suppressed certain contraband seized from defendants automobile. The Court of Appeals held that where the police had probable cause to think that defendant's automobile contained the contraband, the warrantless seizure of the automobile from a parking lot maintained by defendant's employer was lawful even in the absence og exigent circumstances.

Reversed and remanded.

Searches and seizures—Warrantless seizure of automobile lawful

Where police had probable cause to think that defendant's automobile contained contraband, it was not necessary that exigent circumstnaces exist before the automobile could be seized or searched without a warrant and, therefore, warrantless seizure of the automobile from parking lot was lawful.

CJS, Searches and Seizures.

Appeal from Circuit Court, Deschutes County.

Walter I. Edmonds, Jr., Judge.

John W. Burgess, Assistant Attorney General, Salem, argued the cause for appellant. With him on the briefs were James A. Redden, Attorney General, and W. Michael Gillette, Solicitor General, Salem.

J. P. Graff, Eugene, argued the cause and filed the brief for respondent.

Before Schwab, Chief Judge, and Tanzer and Richardson, Judges.

PER CURIAM.

Reversed and remanded.

PER CURIAM.

The state appeals from an order suppressing contraband—marijuana and peyote—seized from the defendant's automobile. As the trial judge found, the police had probable cause to think that defendant's automobile contained the contraband. The police, without a warrant, seized the automobile which was on the parking lot maintained by defendant's employer for employes, and had it towed to the police garage. The police thereafter obtained a search warrant.

The trial judge held that in addition to probable cause, exigent circumstances to seize or search an operable automobile must exist before such can be done without a warrant. This was error. *See State v. Greene,* 30 Or App 1019, 568 P2d 716 (1977).

Reversed and remanded.

Appendix C

IN THE CIRCUIT COURT OF THE STATE OF OREGON FOR DESCHUTES COUNTY

STATE OF OREGON, Plaintiff,	)	
	)	Case No.
vs.	)	20990
GARY LEE FONDREN, Defendant.	)	ORDER

THIS MATTER was heard at 8:30 A.M. on November 4, 1976 pursuant to defendant's motion to suppress evidence. The State appeared through Deschutes County Deputy District Attorney Warren J. West. The defendant appeared personally and with his attorney, Larry O. Gildea, of the firm of Gildea & McGavic, P.C., Eugene, Oregon. The court heard evidence and arguments of counsel, and, not being fully advised, took the matter under advisement. The court has since considered the evidence and written briefs which both parties have filed, and, now being fully advised, finds upon the basis of the evidence and record that exigent circumstances did not exist and concludes, therefore, that the warrantless seizure of the defendant's vehicle and subsequent search of defendant's vehicle and seizure of the evidence contained therein were unreasonable and illegal. There-

fore, and upon the basis of the findings and conclusions set forth in the court's memorandum opinion filed on November 29, 1976,

IT IS HEREBY ORDERED that defendant's motion be and the same hereby is allowed.

IT IS FURTHER ORDERED that any and all evidence obtained from the defendant's vehicle or otherwise as a result of its seizure and subsequent impoundment shall be suppressed in this and any other criminal proceeding against the defendant.

DATED: December 7, 1976.

Walter I. Edmonds, Jr.
Circuit Judge

Appendix D

IN THE CIRCUIT COURT OF THE STATE OF OREGON FOR THE COUNTY OF DESCHUTES

STATE OF OREGON, Plaintiff, vs. GARY LEE FONDREN, Defendant.	Case No. 20990 MEMORANDUM OPINION

This matter comes before this Court upon defendant's motion to suppress contraband recovered from defendant's automobile after it was seized without a warrant from the defendant's employer's parking lot and then searched pursuant to a warrant.

In applying constitutional requirements, there is no difference between seizing and holding a vehicle before presenting the probable cause issue to a magistrate and carrying out an immediate search without a warrant. *State v. Baggett,* 75 Or Ad Sh 3533, *Chambers v. Maroney,* 399 US 42, 90 S Ct 1975, 26 L Ed 2d 419 (1970).

The State must prove that probable cause existed to believe that the search would disclose incriminatory evidence and show that exigent circumstances obviated the need for an independent judicial determina-

tion of probable cause. *State v. Selmer,* 26 Or App 555. Under the facts of this case probable cause existed based upon information from a confidential reliable informer corroborated by independent investigation by the investigating officer. *State v. Delker,* 26 Or App 497.

The officer first obtained the information between 6:30 and 7:30 p.m. on the day in question. The information was corroborated by several methods within the next two hours. He started preparing an affidavit for a search warrant around 10:00 p.m., then abandoned it and contacted the defendant at work prior to defendant's work shift terminating around midnight. Defendant refused to consent to a search and left work. No attempt was made by defendant to remove the vehicle. The officer ordered the vehicle towed from the parking lot and impounded.

"Exigent circumstances" are delineated in *State v. Keith,* 2 Or App 133. In this case, the policeman should have asked himself, "Do I have reasonable cause to believe that I must immediately search the vehicle in order to prevent the loss of evidence?"

An automobile is no more sacrosanct from warrantless search than a person. *State v. Diaz,* 3 Or App 498. A parked unoccupied car presents different exigent circumstances than a moving vehicle. *State v. Amor,* (Mont.) 520 P2d 773; *Coolidge v. New Hampshire,* 403

US 443, 29 L Ed 2d 564, 91 S Ct 2022 (1971). If the defendant had made an attempt to remove the vehicle, then exigent circumstances would exist. *People v. Chavez,* (Col.) 485 P2d 709. Otherwise, the vehicle was subject to surveillance until a warrant could be obtained. *State v. Girard,* 25 Or App 169, Rev. 276 Or 511 (exigent circumstances existed when defendant tried to escape).

Cardwell v. Lewis, 417 US 583, 41 L Ed 2d 325 (1974) does not control. It involved scrapings from the exterior of a vehicle parked in a public place. Nothing from the interior of the car and no personal effects were searched or seized. The Court stated, "This is not to say that no part of the interior of an automobile has Fourth Amendment protection . . . it is the right of privacy that is the touchstone of our inquiry", at 335.

The State contends ORS 167.247 allows a warrantless search absent the requirements of exigent circumstances. This argument was made in *State v. Pearson,* 15 Or App 1. The Court of Appeals declined to decide the issue even though apparently it was properly presented. In light of *Coolidge v. New Hampshire,* supra, this Court concludes that ORS 167.247(1) cannot be constitutionally applied without the requirements of exigent circumstances.

Finally, the State contends that the vehicle may be seized as an instrumentality of a crime. ORS

133.535(3). By incorporation, the instrumentality of a crime may only be seized upon compliance with ORS 133.525 to 133.703. *State v. McCoy,* 249 Or 160, *State v. Keith,* supra, and *State v. Walden,* 15 Or App 259, all involved seizures pursuant to an arrest. Even the justification for permitting the search of an accused incident to a lawful arrest are absent when a search is remote in time or place from the arrest. *Cardwell v. Lewis,* supra. Here no arrest or warrant ever occured prior to the seizure.

Counsel for the defendant may present an appropriate order allowing defendant's motion.

Dated this 29 day of November, 1976.

Walter I. Edmonds, Jr.
Circuit Judge

Appendix E

IN THE CIRCUIT COURT OF THE STATE OF OREGON FOR DESCHUTES COUNTY

THE STATE OF OREGON, Plaintiff, vs. GARY LEE FONDREN, Defendant.	**MOTION TO SUPPRESS**

COMES NOW the defendant by and through his attorney, Larry O. Gildea, and moves the court for an order suppressing any and all evidence seized as a result of the warrantless seizure of a 1976 Buick four-door sedan, Oregon license ECL 267, from the parking lot of the Brooks-Willamette Corporation on or about July 22, 1976, and the subsequent execution of a search warrant of said automobile while impounded at the Bend City Police Station, on or about July 23, 1976, and all evidence derivative therefrom.

This motion is based upon the ground that the warrantless seizure of said automobile was unreasonable and hence a violation of defendant's rights under the Fourth and Fourteenth Amendments of the United States Constitution. The informant upon which police

officers relied to establish probable cause for seizing the automobile as well as for obtaining a search warrant was not reliable. Defendant did not show the contents of the trunk of said automobile to anyone on July 21 or 22, 1976. There was therefore no probable cause for seizure of the automobile. Furthermore, no exigent circumstances existed which justified its seizure.

GILDEA & McGAVIC, P.C.

Larry O. Gildea

Of Attorneys for Defendant